

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MILLSBORO FIRE COMPANY, a)
Delaware corporation,)

Plaintiff,)

v.)

CONSTRUCTION MANAGEMENT)
SERVICE, INC., a Delaware corporation,)

Defendant, Counter-claimant,)
Third-Party Plaintiff,)

v.)

R. CALVIN CLENDANIEL)
ASSOCIATES, P.A., MAHAFFY &)
ASSOCIATES, INC., a Delaware)
corporation,)

Third-Party Defendants.)

C.A. No. 05C-06-137 MMJ

Submitted: September 10, 2009

Decided: November 12, 2009

On Defendant Fidelity and Deposit Company of Maryland's
Motion for Reargument
and
Defendant Construction Management Service Inc.'s
Motion for Reargument/Clarification

ORDER

1. On March 16, 2009, the Court issued a Memorandum Opinion denying Defendant/Third Party Plaintiffs Construction Management Service Inc.’s (“CMSI”) and Fidelity and Deposit Company of Maryland’s (“Fidelity”) Motions for Summary Judgment. The Court found that Millsboro Fire Company’s (“MFC”) cause of action against Fidelity was not ripe until Fidelity denied the claims under the Performance Bond. Further, genuine issues of material fact exist as to whether Fidelity should be estopped from enforcing the contractual limitations period.

2. CMSI and Fidelity filed Motions for Reargument Pursuant to Superior Court Civil Rule 59(e). At the request of the parties, consideration of these motions was stayed until September 10, 2009.

3. Fidelity argues:

(1) “The Court’s analysis overlooks the earliest [accrual] date, and erroneously adopts a later date. The Court cannot extend a surety’s obligations beyond the terms for which it has contracted.”¹

(2) “[T]he Court’s ripeness analysis, based upon the submittal of a claim, and a subsequent denial of the claim implicating a breach, overlooks the

¹*State v. Mitchell*, 212 A.2d 873, 886 (Del. 1965); *Delaware State College v. Fidelity and Deposit Co. of Md.*, 194 A.2d 858, 861 (Del. 1963).

facts – i.e., the language of the policy – and misapprehends the applicable law.”

(3) “Because the contractual limitations period expired regardless of whether MFC submitted a claim, the Court misapprehended the need to address public policy arguments.”

(4) “Because the Court did not find misleading conduct, but only silence on the part of F&D, this issue is controlled by *First Fidelity*,² a case that the Court overlooked. Thus, the Court should reconsider its estoppel analysis.”

(5) “[T]he Court failed to address [the] argument that there is no evidence that MFC performed any of the conditions precedent giving rise to F&D’s obligations under the performance bond. The Court should consider this argument because the Court overlooked it, and the issue is dispositive.”

4. CMSI requests clarification. In its Memorandum Opinion, the Court found that failure to submit claims to the architect, as a condition precedent to dispute resolution or litigation, was a material breach of contract. The Court concluded that plaintiff had fulfilled its contractual obligations regarding claims procedures by referring the exterior concrete and HVAC issues to the architect in writing. To the extent clarification would be helpful, the Court reiterates that the

²*First Fidelity Savings and Loan Assoc. of New Castle County v. Nationwide Mut. Fire Ins. Co.*, 460 A.2d 543, 546 (Del. 1983).

interior concrete claims were never presented in writing to the architect, as required by the contract. Thus, the summary judgment is granted in favor of CMSI on the interior concrete claims.

5. The purpose of reargument is to permit reconsideration of findings of fact, conclusions of law, or judgment of law.³ Reargument usually will be denied unless the moving party demonstrates that the Court overlooked a precedent or legal principle that would have a controlling effect, or that it has misapprehended the law or the facts in a manner affecting the outcome of the decision. “A motion for reargument should not be used merely to rehash the arguments already decided by the court.”⁴

6. Fidelity’s contentions on reargument were fully considered and rejected by the Court in its Opinion denying summary judgment. Defendant has failed to demonstrate that the Court overlooked a precedent or legal principle that would have a controlling effect, or that it misapprehended the law or the facts in a manner affecting the outcome of the decision.

THEREFORE, Defendant Fidelity and Deposit Company of Maryland’s

³*Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del.1969).

⁴*Wilmington Trust Co. v. Nix*, 2002 WL 356371 (Del Super.); *Whitsett v. Capital School District*, Del. Super., C.A. No. 97C-04-032, Vaughn, J. (Jan. 28, 1999); *Monsanto Co. v. Aetna Casualty & Surety Co.*, Del. Super., C.A. No. 88-JA-118, Ridgely, P.J. (Jan. 14, 1994).

Motion for Reargument is hereby **DENIED**. Defendant Construction Management Service Inc.'s Motion for Reargument/Clarification is granted to clarify that summary judgment is granted in favor of CMSI on the interior concrete claims.

IT IS SO ORDERED.

/s/ Mary M. Johnston

The Honorable Mary M. Johnston